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IN THE

Supreme Court of the United States

THE PENNSYLVANIA RAILROAD COMPANY,
Petitioner,

v.

GERTRUDE WOOTEN,
Respondent.

No. 987

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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IN THE

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The Pennsylvania Railroad Company, Petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in the above case on March 20, 1961.

OPINION BELOW

(a) The Opinion of the United States Court of Appeals for the Seventh Circuit is not yet reported. A copy of such Opinion is appended to this Petition.

JURISDICTION

(b) (i) The date of the judgment sought to be reviewed and the time of its entry is March 20, 1961.

(ii) There was no Order respecting a rehearing, and there was no Order granting an extension of time within which to petition for certiorari.

(iii) The statutory provision believed to confer upon this Court jurisdiction to review the judgment in question by writ of certiorari is Title 28, United States Code, Section 1254, subsection 1:

> "Cases in the Courts of Appeals may be reviewed by the Supreme Court by the following methods:
>
> "(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree: * * *"

QUESTIONS PRESENTED

(c) The questions presented for review are:

(1) Whether the Respondent can recover from the Petitioner for personal injuries received when she was a passenger on a through train that ran from Chicago, Illinois, to Miami, Florida, she having purchased her ticket in Indianapolis, Indiana, from the Petitioner and the accident having occurred when the train was on the line of the Atlantic Coast Line Railroad Company;

(2) Whether or not instructions to the jury should have left to the jury the questions of agency and partnership between the two railroads;

(3) Whether or not instructions should have been given leaving to the jury the question of whether or not two coach attendants, at the time of the accident, were em-

ployees of Petitioner within the doctrine of respondeat superior;

(4) Whether or not instructions should have been given leaving to the jury the question of whether the accident occurred in Alabama or Georgia;

(5) Whether or not the doctrine of res ipsa loquitur could be applied to Petitioner as left to the jury by an instruction; and

(6) Whether or not Petitioner should have received a directed verdict in the trial court.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

(d) There are no constitutional provisions, treaties, statutes, ordinances, or regulations involved in this case.

STATEMENT OF THE CASE

(e)&(g) A concise statement of the case containing the facts material to the consideration of the questions presented is as follows:

The Respondent purchased a round trip ticket from Indianapolis, Indiana, to Jacksonville, Florida, to be used on a train known as the South Wind. Said train operated between Chicago, Illinois, and Miami, Florida. The train was operated over Petitioner's tracks from Chicago through Indianapolis to Louisville, Kentucky, and all the train crew for such portion of the operation were employees of Petitioner. The train, while on its regular route, traveled over the tracks of the Louisville and Nashville Railroad Company from Louisville, Kentucky, to Montgomery, Alabama, and for such portion of the trip, the engineers, conductors,

firemen, and brakemen were employees of the Louisville and Nashville Railroad Company. When the train was on its regular route, it traveled over the Atlantic Coast Line Railroad Company tracks from Montgomery, Alabama, to Jacksonville, Florida, and the engineers, firemen, conductors, and brakemen were employees of the Atlantic Coast Line Railroad Company.

For the entire trip from Chicago to Jacksonville, the dining car crew, a lounge car attendant, and two coach attendants were employees of the Petitioner, except as the doctrine of loaned employee may be applicable.

On the trip involved in this case, there had been a train wreck which required that the South Wind train be rerouted so that the Atlantic Coast Line Railroad Company engineers, firemen, conductors, and brakemen began operating the train at Birmingham, Alabama, over tracks of the Atlantic Coast Line Railroad Company. While the train was on this detour, at about four or five o'clock in the morning, an overnight bag bounced out of an overhead baggage rack onto the Respondent, who was dozing in her coach seat, whereby she sustained injuries.

The train was being pulled by three diesel locomotive units, two of which were owned by the Petitioner and one by the Atlantic Coast Line Railroad Company. There were eighteen cars in the train, consisting of two dining cars owned by Petitioner; ten Pullman cars of which Petitioner owned six, the Atlantic Coast Line Railroad Company owned two, the Nashville, Chattanooga and St. Louis Railroad Company owned one, and the Chicago and Eastern Illinois Railroad Company owned one; four coach cars, one of which was owned by Petitioner, one by the Atlantic Coast Line Railroad Company, one by the Florida East Coast

Railroad Company, and one by the Louisville and Nashville Railroad Company; one lounge car owned by Petitioner; and one baggage car owned by the Florida East Coast Railroad Company. The coach car in which Respondent was riding was the one owned by the Florida East Coast Railroad Company.

The Respondent's round trip coach fare from Indianapolis, Indiana to Jacksonville, Florida, amounted to $52.65. This fare was divided between the railroads as follows:

Petitioner	$ 9.16
Louisville and Nashville Railroad Company	24.72
Atlantic Coast Line Railroad Company	18.77

In addition, there was a special seat charge of $1.00 applicable to reserved seat coaches for the trip south which was retained by Petitioner and an additional $1.00 charge for such reserved seat for the return trip which was retained by the Atlantic Coast Line Railroad Company.

The railroads shared the cost and expense incident to servicing and repairing the locomotives of the train under a pool arrangement, of which the Petitioner acted as a clearing house. The Petitioner received from the pool $20.00 a month for acting as such clearing house.

There was an indemnity agreement from the Petitioner to the Atlantic Coast Line Railroad Company concerning meals, beverages, drinks, and drinkable liquids, and an agreement between Petitioner, the Louisville and Nashville Railroad Company, and the Atlantic Coast Line Railroad Company with reference to locomotives used on the South Wind train.

During the time while the train was operated over a track of one of the said railroad companies, it was in the

general charge of a conductor who was in the employ of that company.

The Petitioner's timetable, available to the public, showed that the South Wind train, on its regular route, was on the Petitioner's road from Chicago to Louisville, on the Louisville and Nashville Railroad Company's road from Louisville to Montgomery, and on the Atlantic Coast Line Railroad Company's road from Montgomery to Jacksonville. Each railroad advertised the train over its name.

The Petitioner's tariff on file with the Interstate Commerce Commission and at the Union Station in Indianapolis where the Respondent purchased her ticket covering this train stated in Rule 3, as follows: "Responsibility of Issuing Carriers. In issuing tickets and checking baggage under this tariff for passage over the lines of other carriers participating herein, the issuing carriers act only as agents and are not responsible beyond their own lines, except as such responsibility may be imposed by law with respect to baggage."

The Respondent's ticket was in eight parts, and each part showed the Petitioner as the "Issuing Carrier". One part of the ticket referred to the Petitioner and to the Cities "Indianapolis to Louisville, Kentucky"; the next part referred to the Louisville and Nashville Railroad and to the Cities of "Louisville to Montgomery, Alabama"; the next part referred to the Atlantic Coast Line Railroad and to the Cities of "Montgomery to Jacksonville"; the next part referred to the Atlantic Coast Line Railroad and to the Cities "Jacksonville to Montgomery, Alabama"; the next part referred to the Louisville and Nashville Railroad and to the Cities "Montgomey, Alabama, to Louisville, Kentucky"; the next part referred to the Petitioner and

to the Cities "Louisville to Indianapolis"; the next part, labeled "Contract Not for Passage," referred to "R.T., 6 Mo., Indianapolis to Jacksonville, Florida"; and the last part, labeled "Agent's Stub Not for Passage," was detached from Respondent's ticket by the Indianapolis Union Railway Company and delivered to the Petitioner's Auditor. The other part of the ticket labeled "Not for Passage" was retained by the Respondent after the remaining six parts had been detached. Taking the portions of the ticket in the order named above, the first three parts of the ticket were detached on the Respondent's trip to Jacksonville, and the next three parts were detached on her return trip to Indianapolis.

The Respondent's seat ticket from Indianapolis to Jacksonville consisted of three detachable parts, the first of which was designated "Agent's Stub" and was detached by the Indianapolis Union Railway Company and delivered to Petitioner's Auditor. The second part of said seat ticket designated the amount of the seat charges, and the third part designated the coach car and the number of the seat called for by the ticket.

Each portion of all of these tickets showed the Petitioner was the "Issuing Carrier" and contained the statement at the bottom thereof, as follows:

> "Subject to tariffs. Selling Carrier is Agent only —not responsible beyond its line, except as law imposes liability for baggage. Non-transferable."

The words "carriers participating" in the tariff-quoted above meant the Louisville and Nashville Railroad Company between Louisville, Kentucky, and Montgomery, Alabama, and the Atlantic Coast Line Railroad Company between Montgomery, Alabama, and Jacksonville, Florida.

The accident involved in this case occurred when the train was either in the State of Alabama near the boundary line of that state and the State of Georgia or else in the State of Georgia after the train had crossed the boundary line. The Respondent was dozing in her seat in the next to the last car of the train which had the number SW-2. She did not know whose baggage it was that fell on her, but a ladies' overnight bag bounced off an overhead rack and struck her. The accident occurred around four or five o'clock in the morning on December 23, 1957.

Carrell West was a Coach Attendant employed by the Petitioner on the South Wind. His duties were to check all the luggage in the baggage racks to see that it was in its proper place, check the floors to see that there wasn't any water or anything there so that someone would slip and be injured, keep his car clean, and help the passengers on and off with their baggage. He also took orders from the Conductor. Coach Attendants have different rest periods. These are at night. He heard this accident happened about five o'clock in the morning, but he didn't know anything about it. Grants told him he wouldn't have been on duty at that time. It is possible to get two bags, if they aren't too large, stacked one on top of the other on the baggage racks, but the Coach Attendants don't stack them. Carrell West has seen them stacked in the station, but the Attendants take them down before they leave. In West's experience, he has never seen any of the baggage "jiggling up in the rack." After the passengers get settled, if they want something out of one of their grips, if it is a small one and they can lift it down, they will sometimes get it down themselves and get what they want. On December 22 and December 23 of 1957, West does not remember seeing anything out of the way in the manner in which the baggage was stacked on any of the baggage racks. It was all in order.

Vandor D. Grants was a Coach Attendant on the South Wind that left Chicago on December 22, 1957. The coach seats were nearly full. The baggage racks were not altogether filled up with baggage. Most of the large baggage was at the end of the car. The small bags were overhead. The Coach Attendant moves the bags the first time he sees they are stacked on top of one another. Most of the passengers will double-stack them when they get on the train. The Attendants move them. The Attendants also put baggage on the racks. Grants was in car one which was on the rear of the train and was told by a trainman that a bag fell on a lady in car two. Grants went and told the Conductor. Grants had been cleaning cars, starting with car five and going back to car one. Car two was the second car from the rear end. His cleaning and check of rest rooms would take thirty-five, forty, or thirty minutes. Mr. West was on his rest period. The accident was brought to his attention about four o'clock in the morning. After the train is underway, most of the people ask to have baggage handed down if they can't take it down themselves in case they wish to "exchange in the night." Sometimes they will put it back up and they have it tilted on the rack, and the Attendants have to push it back.

The trainman Grants talked about in car one was a brakeman or a flagman.

When Grants heard of the accident, he went to see the lady. She said the bag that fell was the other lady's sitting by her. It weighed five or six pounds. The bag was on the floor in the aisle of the car. The lady who was hurt was named Gertrude Wooten. She was sitting next to the aisle in Seat 22.

Grants picked the bag up off of the floor and put it back on the rack. There was plenty of room for it. There was no bag stacked on top of another.

About four o'clock in the morning on December 23, 1957, the train was on a freight line. It was rocking more than it does on the main line. This was so just before he learned of the accident. The train was not going as fast as on the regular track because it shakes. That will make the baggage shake too. Grants could not say how long it had been before the accident that he had been in Car SW-2. It could have been as much as a half-hour, but he couldn't say how long it was.

Before the Respondent was injured, Grants had gone through Car SW-2 and gone back to Car SW-1. The baggage was situated on the racks "O.K." They had little lights shining. When he got into Car SW-1, he continued his cleaning in that car. The car that Carrell West was using to take his rest in was not SW-2.

Sometimes in the middle of the night passengers get their own overnight luggage down to use it and put it back. At the time Grants was in Car SW-2 before going to Car SW-1, most of the people were asleep. He didn't see anybody walking around.

Pearl I. Hansen in her deposition testified that on December 23, 1957, she was on the South Wind bound for Miami. She saw the accident about four o'clock A. M. She was seated one seat back from the Respondent and across the aisle. She was wide awake. An overnight case bounced out of the luggage compartment overhead and fell down on to Respondent. It hit her shoulder, went down on to her side, then to the floor and slid three or four feet down the aisle. She did not notice any undue speed or lurching

or anything unusual about the momentum of the train. There was no one standing near the place where the luggage was before it struck Respondent. She had not seen any person handle or touch any luggage near that point in an hour before the accident. She had not noticed anything adverse about any luggage, although it was congested. In a statement made Exhibit 1 to her deposition, the accident was described as being at or near Cragford, Alabama.

O. V. Horace is employed by the Atlantic Coast Line Railroad Company and has been with that railroad forty-five years. In December of 1957, he was Superintendent. When he learned of a derailment on the regular route of the South Wind, he telephoned the General Superintendent at Jacksonville, Florida, and asked him to detour the South Wind northbound and the southbound South Wind. Petitioner's Exhibit B is a map which includes the Atlantic Coast Line Railroad as it was in December of 1957. Cragford, Alabama, is about thirty-five miles from the Alabama-Georgia State line. In December of 1957, the Conductors on the Atlantic Coast Line Railroad had uniforms of a dark blue serge and a cap which had the word "Conductor," but did not have "P.R.R.", on it. When the train was picked up on this particular trip to go over the detour, arrangements had to be made for a train crew of the Atlantic Coast Line Railroad Company to get on at Birmingham. The positions of such crew were conductor, engineer, fireman, baggagemaster, and brakeman. The flagman was supposed to ride on the rear of the train. The duties of a Conductor on his railroad on the South Wind were to secure tickets, see that passengers were detrained at the correct destinations, see that passengers were boarded, seated, and made comfortable, and to pass through the train at intervals for the comfort of the passengers to see

if he could do anything for them. He was responsible for the safety of the train and the personnel of the train. He was the superior officer of the crew. The train crew and other employees, including the Coach Attendants of The Pennsylvania Railroad Company, were under the direction and supervision of the Conductor. The witness Horace had a book of rules of the Atlantic Coast Line Railroad Company which were in effect in December of 1957. Rule 858 reads as follows:

> "Conductors must be familiar with the duties of all members of their crew and all persons employed on trains including Pullman, dining car, express and postal employees, news agents and other train attendants and must enforce the rules applicable to such person while on that train, reporting any case of insubordination, misconduct or failure of duty."

Rule 859 reads as follows:

> "Conductors must pass through their trains for the collection of transportation after leaving each station where their train stops and where it stops at long intervals, they must pass entirely through trains frequently to be assured of the comfort and welfare of passengers and to see that trainmen and others are performing their duties."

Rule 883 under heading of "Conductors" reads as follows:

> "They are responsible for the prompt movement, safety and proper care of their trains, for the performance and conduct of persons employed thereon, and must report any misconduct or neglect of duty. They must not permit any member of the engine or train crew to work if his condition renders him unfit to do so. They must see that the members of their crew are familiar with their duties, ascertain the extent of their experience and instruct them in the safe performance of their work."

The duties of The Pennsylvania Railroad Company's Coach Attendants when they arrive on the Atlantic Coast Line Railroad are to be governed by the Conductor's instructions in assisting in boarding and detraining passengers, comfort of the passengers, to see that the lights are dimmed for the passengers to get their rest in day coaches, and any duty that the Conductor would delegate them to do on the Atlantic Coast Line Railroad in the performance of their duties for the comfort and safety of the passengers. They would be the same as Atlantic Coast Line Railroad Company Attendants. Witness Horace did not know The Pennsylvania Railroad Company instructions. The Atlantic Coast Line Railroad Company Conductors would change the duties of The Pennsylvania Railroad Company's Coach Attendants if necessary. They have perfect jurisdiction over the porters on that train. A porter would be under the jurisdiction of the Conductor on the Atlantic Coast Line Railroad.

The Amended Complaint of the Respondent referred to the train as the Petitioner's train and alleged that at the time of the injury the train was being operated by another railroad company acting either as Petitioner's agent or partner. The Amended Complaint charged that the injuries were "a proximate result of negligence on the part of the defendant and of its said agent or partner, in that (1) they permitted said piece of baggage to remain loose on said coach rack during sleeping hours when the plaintiff was asleep and could not protect herself against the same when it was jostled down by the movement of the train, (2) they operated the train in a negligent manner in said circumstances and thereby caused said piece of baggage to fall from said rack onto the sleeping plaintiff." These allegations were denied by the Petitioner, except that Petitioner admitted that if the alleged

injury occurred, it occurred on a track belonging to another railroad company.

The case originated in the United States District Court for the Southern District of Indiana, Indianapolis Division, and the basis for Federal jurisdiction was that the Respondent was a citizen of the State of Indiana; that the Petitioner was a corporation organized under the laws of the State of Pennsylvania, was a citizen of that state, and had its principal place of business in that state; and that the amount in controversy, exclusive of interest and costs, exceeded the sum of Ten Thousand Dollars.

ARGUMENT

(h) The contested issues present the question of whether or not the Petitioner can be held liable for injuries to a passenger received when a piece of luggage fell off of an overhead rack and struck the Respondent after the train had left this Petitioner's line and was traveling on the line of another railroad. The Amended Complaint refers to the train as the Petitioner's train, alleges that the Petitioner undertook to transport the Respondent all of the way from Indianapolis, Indiana, to Jacksonville, Florida, and alleges that when the train was not on this Petitioner's line, it was operated by an agent or partner of the Petitioner.

Admittedly, there was a sharing of the Respondent's train fare by the railroads involved and a sharing of certain expenses. No one would expect any one railroad to participate in the operation of a through train without receiving some of the fare and without paying some of the expenses.

As to the train being the Petitioner's train at the time of the accident, the Stipulation of the parties shows that the cars were owned by several railroad companies, including the Petitioner, and that the three diesel units pulling the train were owned two by the Petitioner and one by the Atlantic Coast Line Railroad Company. At the time of the accident, the operating crew were Atlantic Coast Line Railroad Company employees.

On the agency question, there was an utter lack of evidence to show that this Petitioner had the right to control the operation of the train at the time of the accident. The train was in the charge of an Atlantic Coast Line Railroad

Company Conductor who may be likened unto the captain of a ship. He had complete charge over all of the personnel on the train. The train, as a matter of fact, was being detoured under directions of the Atlantic Coast Line Railroad Company over tracks of the Atlantic Coast Line Railroad Company. Without this Petitioner's right to control and without a duty on the part of the Atlantic Coast Line Railroad Company to obey instructions of the Petitioner, there would be no agency. There was no showing of such a right and of such a duty. Therefore, the Respondent failed in her burden of proof on this issue. 2 Am. Jur. 202 (Agency, § 251) and page 13 (Agency, § 2).

On the partnership question, there is no showing of a joint interest and community in profit and loss among the various railroads. The train started in Chicago, Illinois, and went to Miami, Florida. It might make money while on one of the railroad company's lines and lose money while on another railroad company's lines. This Petitioner operated the train from Chicago, through Indianapolis, to Louisville. This Petitioner received no revenue from passengers that boarded the train from Louisville on south. Likewise, none of the other railroads received revenue from passengers traveling only from Chicago to Louisville or from and to points between Chicago and Louisville. No railroad had an interest in a profit or loss sustained by one of the other railroads. Therefore, the Respondent failed to sustain her burden of proof on this issue. 10 Am. Jur. 429 (Carriers, § 1695).

The Petitioner's timetable and the ticket purchased by the Respondent showed that the Petitioner operated the train as far south as Louisville and that rest of the Respondent's transportation was by the Louisville & Nashville Railroad Company and then by the Atlantic Coast

Line Railroad Company. The ticket was in several portions that could be detached by the respective railroads. Each portion of the ticket stated that it was sold "Subject to tariffs. Selling carrier is agent only—not responsible beyond its line, except as law imposes liability for baggage. Non-Transferable." The Petitioner's tariff on file with the Interstate Commerce Commission and covering this train stated in Rule 3, as follows: "Responsibility of Issuing Carriers. In issuing tickets and checking baggage under this tariff for passage over the lines of other carriers participating herein, the issuing carriers act only as agents and are not responsible beyond their own lines, except as such responsibility may be imposed by law with respect to baggage." The decision in the case of *Louisville & N. R. Co. v. Chatters*, 279 U. S. 320, 330, 331, 49 S. Ct. 329, 332, holds that in a situation of this kind, there is no duty to transport or assume any responsibility for transportation of a passenger beyond its own line, and that the limitation of liability in the tariff became a lawful condition upon which the service was rendered, binding alike on the carrier and its patron. The difference between the *Chatters* case and the case at bar is that it does not appear that the Petitioner in the *Chatters* case had any employees on the train at the time of the accident, whereas, in the case at bar, the dining car men, the lounge car attendant, and the coach attendants were, as a general proposition, employees of this Petitioner. We do not believe that the Respondent contends that any liability can be based upon the conduct of the dining car men or the lounge car attendant, but Respondent does contend liability can be placed upon one or both of the coach attendants, who were Vandor D. Grants and Carroll West. The undisputed evidence shows that Grants and West were under the complete control of the Atlantic Coast Line Railroad Company Conductor at the time of the accident. They

would be loaned employees. The doctrine of *respondeat superior* would make the Atlantic Coast Line Railroad Company responsible for their conduct and not the Petitioner. *Martin* v. *Anniston Foundry Co.*, 259 Ala. 633, 637, 68 So. (2d) 323, 327; *Delcher Bros. Storage Co.* v. *Reynolds & Manley Lumber Co.*, 80 Ga. App. 288, 292, 55 S. E. (2d) 864, 867.

Furthermore, there was no evidence of negligence on the part of West or Grants. This accident occurred about four or five o'clock in the morning when some of the passengers were asleep and the Respondent was dozing. The Amended Complaint alleges negligence in permitting the piece of baggage that fell to remain loose on the coach rack during sleeping hours when the Respondent was asleep and could not protect herself against the same when it was jostled down by the movement of the train and in operating the train in a negligent manner in said circumstances, thereby causing the piece of baggage to fall from the rack onto the Respondent. There was no showing that there was a more practical way to stow the baggage than was done in this case. There was no showing that the baggage was improperly placed on the rack. The piece of baggage was a small overnight bag. The Respondent did not testify as to anything being out of order, except that the baggage did fall and hit her. Carroll West was in a car forward of the Respondent having a rest period. Vandor D. Grants passed through the car the Respondent was in, cleaned it and inspected it, and had gone to the car to the rear of the Respondent's car when the accident happened. When he was in the Respondent's car, the baggage was all in order. He was unable to testify as to the length of time from when he was in Respondent's car until he heard of the accident. The only witness who saw the accident was Pearl I. Hansen. She was awake and saw nothing out of order before

the baggage fell. As to the negligent operation of the train, we, first of all, come back to the agency and partnership questions heretofore discussed. However, there was no evidence of any sudden lurch of the train or of a sudden application of the brakes or change in the rate of the speed of the train. There was some evidence that the detour route being used at the time of the accident was rougher than the regular route, but no negligence is charged in that respect. Furthermore, it is common knowledge that trains in motion shake to some extent.

The Petitioner moved for a directed verdict at the close of the Respondent's evidence and again at the close of all of the evidence. (Record pages 167 and 168.) These motions were overruled. (Record page 169.) Under the above facts and authorities, these motions should have been sustained.

The Petitioner objected to several of the Court's instructions. Instruction No. 18 appears in the Record at page 229, and the Petitioner's objection thereto at page 54. The instruction left to the jury the question of whether the accident occurred in the State of Alabama or the State of Georgia and applied the rules applicable to common carriers of passengers of the two states, which are somewhat different. The Stipulation of the parties was that the accident occurred either in Alabama or Georgia. (Record pages 139 and 140.) In Exhibit No. 1 to Pearl I. Hansen's deposition, the accident is referred to as having been at or near Cragford, Alabama. (Record page 109.) The word "near" is a relative term, and the accident could have been in Georgia and still have been near Cragford, Alabama, within the meaning of the word "near." There was no evidence as to just where the accident did occur. The objection to Instruction No. 18 was that it was a

matter of pure speculation as to which state the accident occurred in, that the jury should not be permitted to speculate on the facts, and it followed that the Court was speculating on what the law was. The further objection was made that the rules of law applied to common carriers of passengers, and it was not shown that this Petitioner was a common carrier of passengers in either state. The jury should not have been permitted to base a verdict on speculation or to render an arbitrary verdict. *Gay, Sullivan & Co., Inc.* v. *Glaser, Crandell Co.*, 102 Fed. (2d) 149, 150; *Lieberthal* v. *Glens Falls Indemnity Co.*, 174 Fed. (2d) 638, 640. The point that this Petitioner was not a common carrier in either state has been argued above.

Instruction No. 19 appears in the Record at page 230, and the Petitioner's objection thereto at page 55. The instruction submitted to the jury the questions of whether or not the Atlantic Coast Line Railroad Company was the partner or agent of the Petitioner and whether or not Carroll West and Vandor D. Grants at the time of the accident were employees or agents of the Petitioner and whether or not they were negligent. The objection was to the effect that there was insufficient evidence to submit such questions to the jury, as argued above.

Instruction No. 20 appears in the Record beginning on page 232 and again submitted to the jury the question of agency and partnership. The Petitioner's objection thereto appears on page 56 of the Record and states that it is for the same reasons given for the objection to Instruction No. 19 on the question of agency and partnership.

Instruction No. 22 appears in the Record beginning on page 234, and the Objection thereto appears on page 56. These involved the same questions of agency and partnership and the same objection.

Instruction No. 23 appears in the Record beginning on page 235, and the objection thereto appears on page 56. The same questions of agency and partnership and the objection thereto are involved.

Instruction No. 25 appears in the Record on page 239, and the objection thereto on page 56. This instruction involved the doctrine of *res ipsa loquitur*. The Petitioner objected on the ground that there was no evidence that the instrumentality causing the baggage to fall was under the exclusive control of the Petitioner or its employees or its agents or partners. The Petitioner objected for the same reasons as given to the Court's Instruction No. 19 and further pointed out that the evidence showed that even the passengers on the train did at times handle the baggage on the rack and that the instruction was not applicable to the evidence.

It is error to give instructions not applicable to the evidence. *McCarthy* v. *Pennsylvania R. Co.*, 156 Fed. (2d) 877, 882; *Colas et al.* v. *Grzegorek et al.*, 207 Fed. (2d) 705, 710.

IT IS, THEREFORE, respectfully submitted that Petition for Writ of Certiorari should be granted.

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APPENDIX

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

[March 20, 1961]

Before HASTINGS, *Chief Judge*, KNOCH and CASTLE, *Circuit Judges*.

HASTINGS, *Chief Judge*. Gertrude Wooten, plaintiff-appellee, brought this diversity action against defendant-appellant Pennsylvania Railroad Company for personal injuries plaintiff received which were allegedly caused by the negligence of defendant. The case was tried before a jury which returned a verdict for plaintiff. Defendant's motions for a directed verdict and for judgment notwithstanding the verdict were denied, and defendant appealed.

The first issue in this appeal is whether there was sufficient evidence for the trial court to send the case to the jury to determine the question of defendant's negligence. The nature and extent of plaintiff's injuries and the amount of her recovery are not contested here.

Plaintiff was injured by a piece of baggage which fell from a rack above her as she was traveling by train from Indianapolis, Indiana to Jacksonville, Florida. The piece of luggage jiggled loose from the rack while the train was traveling over a stretch of rough freight track in a forced detour caused by an earlier accident on the main passenger track. Plaintiff was injured at approximately 5:00 a.m. on the morning of December 23, 1957, as her train was in the vicinity of the Georgia-Alabama boundary.

Plaintiff had boarded the train, taken her reserved seat and was asleep in it when the piece of baggage fell and struck her.

One eye-witness gave her recollection of the accident in her deposition. She was wide awake and seated one row back and across the aisle from plaintiff at the time. The witness saw a ladies' overnight case bounce out of the luggage compartment above, hit plaintiff on the shoulder, and then fall to the floor. At the time no one was handling, touching, or was in the vicinity of the luggage, nor had anyone handled any nearby luggage. The witness did not remember any unusual speed or lurching of the train at the time of the accident.

Plaintiff had purchased her round trip ticket to Jacksonville from Indianapolis Union Railway Company, defendant's selling agent. The ticket was for passage on the "South Wind" train, a through service from Chicago, Illinois to Miami, Florida provided since 1940 by defendant, the Louisville and Nashville Railroad Company, and the Atlantic Coast Line Railroad Company. The ticket that plaintiff purchased indicated on its face that defendant was the "Issuing Carrier." Each portion of the ticket had printed upon it the following limitation:

> "Subject to tariffs, Selling Carrier is Agent only—*not responsible beyond its line*, except as law imposes liability for baggage. Non-transferable." (Emphasis added.)

The tariffs referred to in the ticket limitation were on file with the Interstate Commerce Commission at Washington, D.C. and with the Indianapolis Union Railway Company at Indianapolis, Indiana and contained the following statement:

> "Rule 3. *Responsibility of Issuing Carrier.* In issuing tickets and checking baggage under this tariff for passage over the lines of other carriers participating herein, *the issuing carriers act only as agents and are not responsible beyond their own lines* [emphasis added], except as such responsibility may be imposed by law with respect to baggage."

Defendant relies on the language of the ticket and the tariffs to restrict its liability to accidents occurring on its own line.

The South Wind traveled from Chicago to Louisville (with one irrelevant exception) on track leased and maintained by defendant. On the first leg of the trip, the locomotive crew, brakemen and conductor were employees of defendant. From Louisville, Kentucky to Montgomery, Alabama the conductor, locomotive crew and brakemen were employees of Louisville and Nashville, and the train traveled over that railroad's tracks.

At the time of the accident, the South Wind was traveling over tracks owned and maintained by Atlantic on the third stage of the trip, from Montgomery to Jacksonville. The locomotive crew and brakemen of the train were employees of Atlantic, and a conductor employed by Atlantic was in general charge of the train. At this point, there were eighteen cars on the South Wind, including two dining cars owned by defendant, ten Pullman cars (defendant owned six), four coach cars (defendant owned one), defendant's lounge-coach car, and a baggage car owned by Florida East Coast Railway Company. Three diesel locomotives were used on the entire trip and were owned by defendant.

The coach car in which plaintiff was injured was owned by Florida East Coast. Two coach attendants were on

duty and in charge of this car from Chicago to Jacksonville. *These two attendants were employed and paid by defendant.* Both wore uniforms and caps bearing defendant's insignia. Their duties included placing baggage on overhead racks in the coach cars and securing it during transit to keep it from falling. In addition, they had the responsibility to check the floors for water or other slippery materials, to keep the cars clean and to help passengers on and off the train with their luggage. At the time of the accident one attendant was taking his rest period and was not in the coach in question. The second, on-duty attendant, who had the responsibility for five coach cars during the other's rest period, was then in a separate coach car, cleaning the cars and restrooms. He stated that he had been cleaning the coach in which plaintiff was riding approximately one-half hour before the accident and had not noticed that the luggage was insecure at that time. After being notified of the accident, the on-duty attendant aided plaintiff; he found the overnight case on the floor and lifted it back onto the luggage rack.

In these circumstances plaintiff advanced three theories under which it contended that defendant was liable for plaintiff's injuries. All three theories were presented to the jury which returned a general verdict finding against defendant. Plaintiff's first theory charged that defendant's own coach employees were negligent in allowing the luggage to remain loose on the baggage racks during sleeping hours. Second, it argued that defendant was in partnership with Atlantic and Louisville and Nashville in the operation of the South Wind. Finally, as the issuing carrier, plaintiff asserted that defendant operated the South Wind to Jacksonville as a principal and had an agency relationship with the other two carriers. As to the final two theories, plaintiff contended that defendant's

partners or agents operated the South Wind in a negligent manner causing the baggage to be shaken off the luggage rack, striking and injuring plaintiff while she was asleep and unable to protect herself.

An examination of the record in this case clearly reveals that the issue of defendant's negligence was properly submitted to the jury. We have said that in "reviewing the ruling of a trial court on a motion for a directed verdict or for judgment notwithstanding the verdict, we must determine whether the evidence justifies the submission of the case to the jury. Such a motion should be denied where the evidence, along with all inferences to be reasonably drawn therefrom, when viewed in the light most favorable to the party opposing such motion, is such that reasonable men in a fair and impartial exercise of their judgment may reach different conclusions. *Valdes* v. *Karoll's Inc.*, 7 Cir., 277 F. 2d 637, 638 (1960), and cases cited therein." *Threatt* v. *United States Steel Corporation*, 7 Cir., 283 F. 2d 411, 413 (1960).

The issue of the alleged negligent conduct of defendant's coach employees—who had the responsibility for securing baggage in the racks—was a matter of disputed fact to be resolved by the jury. Further, a defendant's argument that these two employees were "loaned" to Atlantic, thereby making Atlantic the sole principal liable for the injury, was a matter of disputed fact. Here, plaintiff offered proof that these employees were hired, trained and paid by defendant and, in the absence of orders from the Atlantic conductor, performed their duties according to defendant's training and instruction. Whether these employees were acting in the course of their employment by defendant was a factual issue properly submitted to the jury. Defendant's proof clearly did not fore-

close reasonable men from reaching differing conclusions on this issue.

In addition, there was sufficient evidence to take the case to the jury on the issues of agency and partnership. Defendant's brochure advertised the South Wind as a through train service provided by defendant and Louisville and Nashville. An agreement among the three participating railroads indicated that the South Wind was operated "in joint service." Certain of defendant's dining car, lounge and coach employees continued on duty on the train on the entire trip to Jacksonville. The fare for the ticket was divided among the three railways. Defendant retained the entire one dollar special charge for a reserved seat from Indianapolis through to Jacksonville. A schedule of rental payments for the use of diesel locomotives was arranged. The working agreement included provisions for use of track and an allocation of cost and expenses of maintaining locomotives and other general expenses. In addition there were indemnity agreements between the parties relating to the operation of the locomotives and to the liability arising from the dining service provided by defendant on the South Wind. Plaintiff offered sufficient evidence to make the issues of agency and partnership matters of disputed fact and thereby preclude a directed verdict in defendant's favor.

The record reveals there were genuine issues of fact as to the negligence of defendant's coach employees and Atlantic's employees. It further indicates a dispute as to the status of defendant's coach employees and the relationship between defendant, Atlantic, and Louisville and Nashville. If the jury was convinced that the alleged negligence existed and could be imputed to defendant, then defendant's disclaimer of liability printed on its ticket and in its tariff could not absolve it from liability oc-

curring beyond its own line. *Rosenfeld* v. *The Peoria, Decatur and Evansville Railway Company*, 103 Ind. 121, 123 (1885). 10 Am. Jur. (Carriers) § 1694, p. 428. Defendant's reliance in this regard upon the case of *L. & N. R. Co.* v. *Chatters*, 279 U.S. 320 (1929) is misplaced. There, a directed verdict in favor of an issuing carrier was proper in a tort suit against it and the connecting carrier where there were no allegations or proof of negligence by its employees or of such relationship that negligence could be imputed to the issuing carrier. These very issues were in dispute in the case before us.

Defendant contends that the trial court erred in giving certain instructions to the jury. Each of these instructions was properly objected to at trial. Defendant does not assert that the instructions are erroneous as a misstatement of the law, but states that they were inapplicable and prejudicial in the circumstances of this case. The court's instructions relating to the partnership and agency relationship between defendant and Atlantic, the status of defendant's two coach employees, and their alleged negligence were objected to on the ground that there was insufficient evidence to submit such questions to the jury. However, we have held above that on the evidence in the record those issues were matters of disputed fact and that the trial court properly submitted them to the jury. These instructions were properly given.

Next, defendant objected to an instruction which correctly stated the duty of care of common carriers under Alabama and Georgia law and required the jury to apply the proper standard to defendant's conduct, depending upon the state in which the jury found the accident occurred. Defendant asserted that "it was a matter of pure speculation as to which state the accident occurred in, that the jury should not be permitted to speculate on the

facts, and it followed that the Court was speculating on what the law was." We disagree. The parties had stipulated that the accident happened either in Alabama or in Georgia. The accident occurred at nighttime, and it was difficult to establish its precise location. There was deposition testimony that the accident occurred in Alabama, and the stipulation established that the train stopped in Georgia to allow a physician to board to attend to plaintiff's injuries. This testimony presents a substantial factual basis upon which to instruct the jury. In any event, the standards of care established by Alabama and Georgia in these circumstances are not materially different[1], and the placement of the accident is not a crucial element in plaintiff's recovery.

Defendant asserts that it was error for the court to give an instruction on *res ipsa loquitur* in the circumstances here. We have said that such instruction is "a rule which permits or requires an inference of negligence to be drawn from the fact of an accident plus the circumstances which characterize the accident. It is an evidential inference, which will carry a case to the jury, but is not binding upon the jury * * *." *Eker* v. *Pettibone*, 7 Cir., 110 F. 2d 451, 455 (1940). *Cochran* v. *Pittsburgh & L. E. R. Co.*, D.C.N.D. Ohio, 31 F. 2d 769, 771 (1923). We have examined the record and find there was sufficient factual evidence of defendant's control of the coach car and the train itself to make appropriate the instruction defendant objects to.

Finding no error, the judgment of the district court is

AFFIRMED.

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[1] In Alabama the law requires common carriers of passengers to exercise "the highest degree of care, skill, and diligence." *Alabama G.S. R. Co.* v. *Hill*, 93 Ala. 514, 521, 9 So. 722, 725 (1891). In Georgia the law requires "extraordinary diligence." *Southern Ry. Co.* v. *Reeves*, 116 Ga. 743, 744, 42 S.E. 1015 (1902).

JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

[March 20, 1961]

Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division.

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Indiana, Indianapolis Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED, with costs, in accordance with the opinion of this Court filed this day.

Hon. JOHN S. HASTINGS, Chief Judge

Hon. WIX G. KNOCH, Circuit Judge

Hon. LATHAM CASTLE, Circuit Judge

SUPREME COURT, U. S.

JUN 15 1961

JAMES R. BROWNING, Clerk

IN THE

SUPREME COURT OF THE UNITED STATES.

THE PENNSYLVANIA RAILROAD COMPANY,
Petitioner,

v.

GERTRUDE WOOTEN,
Respondent.

No. ~~937~~ 107 y61

RESPONDENT'S BRIEF

In Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

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IN THE

SUPREME COURT OF THE UNITED STATES.

THE PENNSYLVANIA RAILROAD COMPANY, Petitioner,		
v.		No. 987.
GERTRUDE WOOTEN, Respondent.		

RESPONDENT'S BRIEF

In Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

STATEMENT OF THE CASE.

This is a diversity common-law negligence action brought by Respondent, a citizen of Indiana and a resident of Indianapolis, in the United States District Court for the Southern District of Indiana, Indianapolis Division, against the Petitioner railroad company, a corporate citizen of Pennsylvania, doing business in the Southern District of Indiana, to recover damages received by her due to alleged negligence of the Petitioner, its agents, or a partner of Petitioner, while Respondent was being transported on Petitioner's through train running between Chicago, Illinois, and points on the east coast of Florida.

A general verdict for Respondent was returned by the jury, upon which the District Court entered judgment. Petitioner appealed and the United States Court of Appeals for the Seventh Circuit on March 20, 1961, affirmed the judgment of the District Court. On appeal, Petitioner did not question the extent of Respondent's injuries or the amount of the verdict. Therefore, evidence relating to injuries and damages does not appear in the Record. Petitioner now seeks review of the judgment of the Court of Appeals by writ of certiorari.

It is charged in the amended complaint (A., pp. 1-4) that the Petitioner, with other railroad companies acting either in an agency or in a partnership relationship with Petitioner, operated a through train called the "South Wind" from Chicago, Illinois, to points in Florida and return; that the Petitioner undertook either as principal or as a partner to transport Respondent on said train from Indianapolis, Indiana, to Jacksonville, Florida, on through passenger and seat tickets issued by Petitioner as "issuing carrier" and sold to Respondent by Petitioner's selling agent, Indianapolis Union Railway Company; that while the train was traveling on a track of one of the other railroad companies a piece of baggage was shaken off an overhead rack and fell and struck Respondent while she was asleep in a reclining seat below and seriously injured her; and that her injuries were caused by negligence of the Petitioner, and its agents or of its partner in that (1) they negligently permitted the baggage to remain loose on the overhead racks during sleeping hours in the nighttime,

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The following references are used in this Brief:

Petitioner's Appendix as printed for the use of the Court below	"A"
Stipulation of Facts	"S"
Exhibit to the Stipulation of Facts	"Sx"
Original Exhibit	"Ox"
Deposition	"D"
Petition for Certiorari	"Pet. Cert."

and (2) they operated the train in a negligent manner, causing the baggage to be shaken off the rack and to strike and injure Respondent while asleep and unable to protect herself against it. These averments are denied in Petitioner's answer. No affirmative defense is pleaded (A., pp. 5, 6).

Respondent supplements herein Petitioner's Statement of the Case insofar as that statement omits or does not fully set forth the following material facts which the jury had a right to consider:

The detour track on which the train was being operated at the time of the accident was a rough freight track on which the train rocked and shook, shaking the baggage on the overhead racks (A., pp. 96-97, D of Grants). The distance from Birmingham, Alabama, to the Alabama-Georgia State Line on this rough track was approximately 147 miles (A., p. 53).

The coach attendants on this train were on duty all the way from Chicago to Jacksonville, Florida, and were in the employ of the Petitioner (A., pp. 120-123). Petitioner formerly provided a coach attendant for each coach car, but cut that number so that each attendant had two cars to look after (A., p. 91, D of Grants). Carrell West was a coach attendant on this train and had been ever since it was inaugurated in December of 1940 (A., p. 58, D of West). The duties of a coach attendant included the duty to check the luggage on the racks to see to it that it is properly placed (A., p. 60, D of West). West wore a uniform and cap bearing Petitioner's insignia "PRR" (A., p. 66, D of West). As coach attendant he performed the duties which the Petitioner gave him to do. If the conductor asked him to do something he did that, but otherwise he did the things the Petitioner had trained and told him to do (A., p. 61, D of West). He was in his rest

period at the time of this accident (A., pp. 65-66, D of West).

The only other coach attendant on this train was Vandor Grants, who had five cars to look after during West's rest period (A., p. 91, D of Grants). His duties included the duty of putting baggage on the racks and going through the cars to see to it that the baggage on the racks is pushed back so that it would not fall down (A., pp. 89-90, D of Grants). He had not been in the car in which the accident happened for about a half hour prior thereto (A., p. 102, D of Grants). He wore a uniform on duty and a cap bearing Petitioner's insignia "PRR" (A., p. 92, D of Grants).

In addition to Petitioner's two coach attendants, fifteen other employees of the Petitioner were on duty on this train all the way from Chicago to Jacksonville. These consisted of the dining car crews and a bar-lounge attendant (A., p. 140, S par. 11). All of these seventeen employees of the Petitioner participated in the operation of this train all the way to Jacksonville and were paid for their services **entirely by the Petitioner** (A., pp. 120-123).

The South Wind train on this trip was made up by the Petitioner at Chicago and consisted of eighteen cars and three diesel locomotives. The Petitioner owned a majority of the locomotives and cars (A., p. 140, S par. 9). The Petitioner advertised this train in a timetable folder, which it published and distributed and which Respondent used (Ox 7 to the S; A., p. 10). This timetable was devoted exclusively to the South Wind and advertised the train as providing through service from Chicago to Florida via Indianapolis and on which reclining coach car seats could be reserved from Chicago to Jacksonville. The timetable is headed in large bold face type letters:

"PENNSYLVANIA RAILROAD
SERVING THE NATION
THROUGH SERVICE -CHICAGO-
INDIANAPOLIS -FLORIDA"

(Ox 7 to the S)

The South Wind was also advertised by Petitioner as offering through service from Chicago to both Florida coasts in a display advertisement which Petitioner placed in the official railway guide (Ox 8 to the S).

There are in evidence three written agreements, constituting all the written agreements between Petitioner and the Atlantic Coast Line Railroad Company concerning the operation of the South Wind train (A., pp. 147-162, Sx 3, 4, 5, 6). The first, consisting of two letters, constitutes the agreement initially entered into when operation of the train began in December of 1940 (A., pp. 147-150, Sx 3, 4). In one of these letters Atlantic Coast Line Railroad Company prescribed the terms and conditions on which the equipment proposed by the Petitioner could be operated over its line. One of these conditions was that Atlantic would not participate in any costs for coach attendants or for other specified train employees. Another condition required Petitioner to execute an indemnity agreement "covering liability for the acts or omissions of its employees when operating over the Atlantic Coast Line Railroad." These and other terms and conditions in this first agreement were accepted in writing by Petitioner (A., pp. 148, 149, Sx 3).

The second written agreement is the aforementioned indemnity agreement required from Petitioner by Atlantic. In the preamble the Petitioner recites that "certain passenger cars and diners of The Pennsylvania Railroad Company . . . in charge of and manned by employees of the

Pennsylvania move over certain portions of the line of railroad of Atlantic Coast Line Railroad Company . . . for the purpose of enabling the Pennsylvania to serve meals and also to carry, handle, sell and dispense thereon lawful beverages, drinks and drinkable liquids," and in this agreement the Petitioner assumes responsibility and liability for and indemnifies the Atlantic Coast Line Railroad Company against loss or damage "(2) by reason of any injury to person or persons . . . occasioned by or arising out of any negligent act or omission of the Pennsylvania, its officers, agents or employees, while upon the property or railroad of the Atlantic for the aforesaid purposes in connection with such passenger or dining cars" (A., pp. 151, 152, Sx 5).

The third agreement is between Petitioner, the Atlantic Coast Line Railroad Company (hereinafter called "Atlantic") and the Louisville and Nashville Railroad Company (hereinafter called "L. & N.") concerning the furnishing of the diesel locomotives for the South Wind train and the pooling and apportioning of the locomotive expenses on a mileage basis (A., pp. 153-162, Sx 6). In the preamble the parties recite that "the parties hereto operate a through train between Chicago, Illinois, and Jacksonville, Florida, known as the 'South Wind' train" (A., p. 153). And in Section VI they refer to these locomotives as being "operated in joint service under this agreement" (A., p. 158). The agreement provided that the Petitioner and Atlantic shall furnish the locomotives for this train and that the L. & N. shall pay them a rental for having them on its line (A., pp. 153, 154); that the servicing costs shall be pooled (A., p. 156) and that the Petitioner shall act as a "clearing house" for distributing the same among the parties (A., p. 157); and other details, including indemnities, are provided (A., pp. 159-161).

In practice the passenger fares that are collected by Petitioner for through service on the South Wind train to Florida are divided by the Petitioner with the Atlantic and the L. & N. on a mileage basis, but not the seat charge. The special reserved coach seat charge for a seat from Indianapolis, Indiana, to Jacksonville, Florida, is retained entirely by the Petitioner (A., p. 142, S par. 14).

At Indianapolis the Petitioner by its selling agent, Indianapolis Union Railway Company, issued round trip passenger tickets and round trip reserved seat tickets to Jacksonville and return for passage on the South Wind train (A., p. 136, S par. 3). The ticket sold to Respondent was in a strip of eight detachable parts, each headed by the name "INDIANAPOLIS UNION RAILWAY CO." and each designating "Jacksonville, Fla." as the only destination and each designating the Petitioner by its letters "PRR" as the "ISSUING CARRIER." There is nothing stated or shown on any part of this ticket as to any relationship existing between Petitioner, the Atlantic or the L. & N. Their names appear by their initials on the six detachable parts following the first two, indicating only the lines of the route between the named cities (A., p. 145, Sx 1).

Petitioner also issued as the "ISSUING CARRIER" and sold by its said selling agent to Respondent a three-part reserved seat ticket to Jacksonville. This ticket was for a through seat reservation in a through coach car. A return seat reservation ticket in three parts was also issued by the Petitioner and sold by its said selling agent at Indianapolis to the Respondent. Neither the names of the Atlantic or of the L. & N. appear by initial or otherwise on the seat tickets. Only the names of the Petitioner ("PRR") as the "ISSUING CARRIER," and of Petitioner's said selling agent appear on the seat tickets (A., p. 146, Sx 2).

In each detachable part of both the passenger and the seat tickets issued by the Petitioner for use on said South Wind train and sold by Indianapolis Union Railway Company as Petitioner's selling agent there appears in small print a statement as follows:

> "Subject to tariffs. Selling carrier is agent only—not responsible beyond its line, except as law imposes liability for baggage. Non-transferable."

Said statement appears on all tickets sold by Petitioner's said selling agent for transportation on the South Wind train irrespective of whether the destination specified in the ticket is beyond or on Petitioner's own line (A., p. 139, S par. 7). Petitioner's said selling agent, Indianapolis Union Railway Company, whose name heads part of said tickets, is itself a railroad carrier, owning and operating the Union Station at Indianapolis and the tracks therein and the approaches thereto and it receipts for and handles all baggage car baggage that is transported on trains using the station, including the South Wind. It also services said train by inspecting and oiling its axles at said station (A., pp. 136-137, S pars. 4 and 5).

Common carriers of passengers in Alabama are required to exercise the "highest degree of care," and in Georgia they are required to exercise "extraordinary diligence" for the protection of their passengers.

There was uncontroverted testimony by an eye witness that the accident occurred at or near Cragford, Alabama (A., p. 109, D of Hansen); that no person was near the overhead rack in question within an hour before the accident (A., p. 114, D of Hansen); and that the luggage seemed to be properly placed therein (A., p. 114, D of Hansen). Petitioner's on-duty coach attendant testified that the baggage on the racks was "O. K." when observed about a half-hour before the happening of the accident (A., pp. 102, 103, D of Grants).

ARGUMENT.

No reason suggested by Rule 19 or any other "special or important reason" for the granting of a writ of certiorari in this case is stated anywhere in the Petition, amplified in the argument as required by Rule 23 (h), or otherwise apparent from anything in the Petition or Record.

By its general verdict the jury found Petitioner responsible for negligence causing injury to Respondent, which under the evidence the jury could have found consisted of either (a) negligent failure of the coach attendants to see that baggage on overhead racks was secure, or (b) negligent operation of the train by its crew over the rough detour track, or both. There was testimony as well as documentary evidence upon which the jury could have found as a fact that at the time of the injury the coach attendants were acting as employees of Petitioner and that the Atlantic Coast Line Railroad Company, whose crew was operating the train, was either an agent or a partner of Petitioner in operating it.

The "questions presented for review" (Pet. Cert. 2-3) would require this Court to review the evidence and determine its sufficiency to present a jury question on each of the fact issues of whether at the time of the injury the coach attendants were Petitioner's employees, whether Atlantic was Petitioner's agent or partner, whether the accident occurred in Alabama or Georgia, whether Petitioner had such control over the train and baggage as to make applicable the rule of *res ipsa loquitur*, and whether the coach attendants or the train crew were guilty of causal negligence.

No reason for certiorari exists except Petitioner's desire for another review of the District Court's judgment,

which has been affirmed by the Court of Appeals as to each of Petitioner's "questions." If the evidence is reviewed, as was done by the courts below, it is clear that it is sufficient to support the submission of each fact issue to the jury and to support a finding on that issue for the Respondent.

QUESTIONS 1, 2, AND 3.

Petitioner's Responsibility for the Acts of the Coach Attendants and Train Crew.

(a) Employee Relationship of Coach Attendants to Petitioner.

The evidence is more than ample to support a finding that at the time of the injury the coach attendants, whose duty it was to see that the overhead baggage was secure, were in the employ of Petitioner.

The coach attendants in charge of the car in which Respondent was riding when injured were Petitioner's employees West and Grants, who were on duty and in charge of said coach car all the way from Chicago to Jacksonville (A., pp. 57, 80). West had served on coaches of the South Wind train in Petitioner's employ ever since the train was inaugurated in December, 1940 (A., p. 58, D of West). Grants had been in Petitioner's employ thirty years (A., p. 81, D of Grants). The duties of coach attendants were given them by the Petitioner and included the duty of placing baggage on overhead racks in the coach cars and looking after the same during transit to keep the same in proper place thereon to prevent it from falling (A., p. 60, D of West; A., pp. 89-90, D of Grants). Both wore uniforms on duty, including a cap bearing Petitioner's insignia "PRR" (A., pp. 66, 67, D of West; A., p. 92, D of Grants). If the conductor asked or ordered them to do something, they did it, but otherwise they

performed the duties which Petitioner gave, told, and trained them to do (A., p. 61, D of West). There is, however, no evidence that Atlantic's conductor asked either of the coach attendants to do anything. Both of these coach attendants participated in the operation of the train all the way to Jacksonville and were paid entirely by Petitioner for their services (A., p. 123).

As far back as December of 1940, when the original arrangements were made by the Petitioner with Atlantic to operate this train equipment over the line of the latter company, it was contemplated that coach attendants in the employ of the Petitioner would be on duty while the coach cars traveled on the line of Atlantic and it was agreed between the Petitioner and Atlantic that Atlantic would not pay any part of the cost of such coach attendants (A., p. 148, Sx 3, par. 9). It was also agreed that the Petitioner should execute an indemnity agreement "covering liability for the acts or omissions of its employees when operating over the Atlantic Coast Line Railroad" (A., p. 149, Sx 3, par. 12). Petitioner did execute such an indemnity agreement, wherein it recited that certain of its passenger cars and diners "in charge of and manned by employees of the Pennsylvania move over certain portions of the line of railroad of Atlantic Coast Line Railroad Company" (A., p. 151, Sx 5), and wherein the Petitioner assumed "full responsibility and liability" for any loss or damage suffered by Atlantic "(2) by reason of any injury to person or persons . . . occasioned by or arising out of any negligent act or omission of the Pennsylvania, its officers, agents or employees, while upon the property or railroad of the Atlantic for the aforesaid purposes in connection with such passenger or dining cars."

Petitioner contends these employees were "loaned" to Atlantic and that it would not be responsible for their

conduct (Pet. Cert., pp. 4, 17, 18). The cases of **Martin v. Anniston Foundry Co.**, 259 Ala. 633, 68 So. (2d) 323, and **Delcher Bros. Storage Co. v. Reynolds and Manley Lumber Co.**, 80 Ga. App. 288, 55 S. E. (2d) 684, do not support that contention. In both of those cases there was evidence that the employees involved were loaned or borrowed.

There is no evidence whatever in the Record here that Atlantic borrowed these coach attendants from the Petitioner to perform their duties as coach attendants on its line. As already pointed out, the duties of the coach attendants all the way to Jacksonville given them by the Petitioner included looking after the baggage on the racks to prevent the same from falling therefrom. This was not a duty given them by the conductor of the Atlantic. They were not "loaned" employees in the employ of Atlantic. Rather, there is tacit admission on the part of the Petitioner over its signature in the indemnity agreement (A., p. 151, Sx 5) hereinbefore mentioned that certain passenger cars and diners of the Petitioner were in charge of and manned by employees of the Pennsylvania as they moved over certain portions of the Atlantic line. This is the agreement which Atlantic required from the Petitioner with regard to the operation of the South Wind train (A., pp. 147-150, Sx 3, 4; A., pp. 141, 142).

Whether or not the coach attendants were Petitioner's employees was a fact question upon which there was ample evidence to support an affirmative finding as part of the general verdict, and the Court of Appeals properly so held (App. to Pet. Cert. 26-27).

(b) **Agency Relationship of Atlantic to Petitioner.**

The evidence is sufficient to support a finding that Atlantic, whose crew was operating the train over the rough detour track, was the agent of Petitioner, who undertook

to transport Respondent all the way from Indianapolis to Jacksonville.

In Petitioner's timetable for its South Wind train, which it published and made available to the public, including Respondent (A., p. 143, S par. 16 and Ox 7 to 8) and which Respondent consulted (A., p. 16), the Petitioner advertised said train as providing through service from Chicago to Florida via Indianapolis, and that reclining coach car through seats could be reserved from Chicago to Jacksonville. This timetable is headed in large bold face type letters:

"PENNSYLVANIA RAILROAD
SERVING THE NATION
THROUGH SERVICE—CHICAGO—
INDIANAPOLIS—FLORIDA"

The only railroad companies named or indicated on the reserved coach seat ticket which Petitioner issued and sold to Respondent through its selling agent were Indianapolis Union Railway Company and the Petitioner by the letters "PRR" as the "issuing carrier" (A., p. 146, Sx 2). The charge made by Petitioner for the reserved seat from Indianapolis to Jacksonville was retained entirely by the Petitioner (A., p. 142, S par. 14).

The car on which Respondent was sold a reserved seat in consideration of a fare which was retained entirely by Petitioner was in charge of Petitioner's attendants during the entire trip, as detailed, *supra*, and these attendants performed duties as specified by Petitioner among which was the duty to see to it that baggage on overhead racks was secure and would not constitute a hazard to passengers.

This was ample evidence from which the jury could find that Petitioner, as principal, undertook to see to it

that Respondent would be transported to Jacksonville in a particular coach car and in a particular reserved seat, and that for the purpose of that undertaking the Atlantic was constituted and acted as Petitioner's agent.

Although Petitioner was not by law required to undertake to transport a passenger beyond its own line to a destination on a line of another carrier, the law nevertheless permitted the Petitioner voluntarily to undertake to transport Respondent to Jacksonville in the reserved coach seat for which it issued a seat ticket to the Respondent, with connecting carriers acting as its agents for that purpose.

When a common carrier enters into such an undertaking, a connecting carrier that assists in the performance of such undertaking is for that purpose regarded as the agent of the undertaking carrier and the employees of the connecting carrier are, as regards to such passenger, regarded as the employees of the undertaking carrier.

IV **Michie, Carriers** (1915), p. 3315, Sec. 3677;
10 **Am. Jur.** (Carriers) 427, Sec. 1693.

The Court of Appeals properly held the evidence sufficient to support a finding that Atlantic was Petitioner's agent (App. to Pet. Cert. 27).

(c) **Partnership Relationship Between Atlantic and Petitioner.**

The evidence is sufficient to support a finding that Atlantic and Petitioner were in fact partners in the operation of the train, thereby rendering Petitioner liable for Atlantic's negligence.

The South Wind train was advertised in a display advertisement over the names of the Petitioner and of the L. & N. as providing through services from Chicago to

both Florida Coasts (A., p. 142, Ox 8). Atlantic also advertised the South Wind (A., p. 49).

In the locomotive agreement (A., pp. 153-162, Sx 6) between Petitioner, the L. & N., and Atlantic, it is recited in the preamble that "the parties hereto operate a through train between Chicago, Illinois, and Jacksonville, Florida, known as the 'South Wind' train," and in Section VI of that agreement it is stated that the locomotives of said train are "operated **in joint service** under this agreement." (Emphasis supplied.) In Section I of the agreement, Petioner and Atlantic agreed to provide the diesel locomotives for moving the train between Chicago and Jacksonville and the L. & N. agreed to pay a rental to Petitioner and Atlantic for the use made by L. & N. of the locomotives in moving the train over its line. It is agreed in Section III that costs and expenses incident to servicing and preparing the diesel locomotives at all terminals, and for fuel, lubricating oil, and other locomotive supplies shall be "pooled." Section IV provides the Petitioner shall assemble the costs and charges, distribute the same among the parties on the basis of certain track mileage percentages set out in Section II, and that Petitioner should be paid $20.00 per month for its said accounting services. Section V deals with costs and repairs to the locomotives. Section VI also provides a definition of possession of the locomotives involved and that the party in possession indemnifies the owner thereof against liability, loss, or damage to the locomotives due to the fault of the party in possession or caused by fire, lightning, storm, etc. It also provides that each party shall protect and indemnify and save harmless each of the other parties against claims, liability, judgments, suits, and costs, to which another party may be subject by reason of injury to or death of a person and damage to property arising from the use, movement, or operation of any of the locomotives while in possession of a party.

The train for the trip in question was made up by the Petitioner in Chicago and had three diesel locomotives, two of which were owned by the Petitioner and one by the Atlantic. It had a total of eighteen cars consisting of two dining cars, both owned by the Petitioner; ten pullman cars, of which the Petitioner owned six, Atlantic owned two, and two were owned by other railroad companies; four coach cars, one of which was owned by each the Petitioner, the Atlantic, the L. & N., and one by another company; one lounge-coach car, owned by the Petitioner; and one baggage car, owned by another company (A., p. 140, S par. 9).

From Chicago through Indianapolis to Louisville the train was operated wholly by employees of the Petitioner. These consisted, in addition to the conductors and brakemen and the locomotive crew, of a total of seventeen employees constituting the dining car crews and the coach car attendants. Said seventeen employees of the Petitioner continued on duty on said train all the way to Jacksonville, and in the performance of their duties they "participated" in the operation of the train all the way to Jacksonville and were paid for their services entirely by the Petitioner (A., pp. 120-123, Ans. to Interrog. 10-12). At Louisville a locomotive crew, a conductor and a brakeman of L. & N. replaced those of the Petitioner. At Birmingham the train was rerouted from its regular track, which went to Montgomery, over a track of the Atlantic extending through Waycross, Georgia, to Jacksonville, Florida, and at Birmingham a locomotive crew, a conductor, and a brakeman of Atlantic replaced those of L. & N. (A., p. 141, S. par. 12 and amendment thereto, A., p. 163; A., p. 45). Petitioner's coach car attendants, its bar-lounge attendant and its dining car crew continued on duty all the way to Jacksonville (A., p. 122).

The only destination designated on any of the detachable parts of the passenger ticket (A., p. 145), issued by

Petitioner and sold to Respondent by Petitioner's selling agent, is Jacksonville, Florida. On the ticket there appear by their initials the names of the Petitioner and of L. & N. and Atlantic, indicating that the transportation would be over their respective lines between certain points. The fare in the amount of $52.65 paid by Respondent for her through passenger ticket was divided among the three participating railroad companies, so that Petitioner received $9.16 thereof, the L. & N. $24.72, and the Atlantic, $18.77 (A., p. 142, S par. 14).

The jury could properly find from the foregoing evidence that a partnership relationship existed between the Petitioner and the Atlantic in the operation of this train at the time and place of the accident in question. The parties obviously had a joint interest in the operation of the through South Wind train, and they obviously had a community of interest in the profit and loss of the through business done by this train. This train clearly was inaugurated and operated for the purpose of capturing through tourist transportation business between Chicago and points in Florida for the mutual financial benefit of the Petitioner, the L. & N., and Atlantic.

The law is clear that common carrier railroad companies may validly associate themselves for the purpose of jointly operating a through train on a route made up of their connecting tracks. If they do so and have a joint interest and community in the profit and loss of such business they may in fact constitute a partnership for the purpose of such business.

10 **Am. Jur.** (Carriers), 428, Sec. 1694;
Lehigh Valley R. Co. v. DuPont (C. A. 2), 128 Fed. 840, 845, 846;
IV **Michie, Carriers** (1915), p. 3314, Sec. 3673.

The Court of Appeals properly held the evidence sufficient to support a finding that Atlantic and Petitioner were partners (App. to Pet. Cert. 27).

(d) Tariff and Ticket Disclaimer of Liability Does Not Absolve Petitioner.

Petitioner could not avoid liability for negligence in the operation of the train by its agent or partner, Atlantic, or for negligence of its own coach attendant employees by any provision in its tickets or tariff purporting to absolve itself from liability for accidents occurring beyond its own line. In point is 10 **Am. Jur.** (Carriers) 428, Sec. 1694, where it is said:

> "The initial carrier may become liable for the acts of a connecting carrier, **regardless of restrictions and limitations stipulated in the ticket,** because of the existence of a partnership relation between it and the connecting carriers, or an arrangement whereby the initial carrier controls or operates its own and the connecting lines as one continuous system, or jointly with the other carriers. The exigencies of modern travel and the rapid growth of passenger traffic, have induced some carriers, whose lines are conducted as a single system for the purposes of the traffic between different points originating upon either line, to constitute themselves as a partnership for the business of such traffic. In such event, although the general management of each road is retained by the corporation owning it, the several corporations are as to such business partners and liable upon the principles of the law of agency." (Emphasis supplied.)

To the same effect is the decision by this Court in **New York Central R. Co. v. Lockwood,** 84 U. S. (17 Wall.) 357, 384, 21 L. Ed. 627, 641, where the Court said:

". . . That it is not just and reasonable in the eye of the law for a common carrier to stipulate for exemption from responsibility for the negligence of himself or his servants."

This is the law in Indiana, where the transportation contract was entered into. The Supreme Court of Indiana in **Rosenfeld v. Peoria, Decatur and Evansville R. Co.**, 103 Ind. 121, 123, 2 N. E. 344, 345, 346, said:

". . . It is the settled law of this State, abundantly supported by authority and reason, that while common carriers may, by contract, limit their liability as insurers, they can not, by contract, relieve themselves from the consequences of their own negligence or fraud. The law will not allow a common carrier to contract to be safely negligent or dishonest . . ."

The Petitioner cites **Louisville and Nashville R. R. Co. v. Chatters**, 279 U. S. 320, 73 L. Ed. 711 (Pet. Cert., p. 17) to its contention that the limitation of liability in Petitioner's tariff was binding on the Respondent and that the Petitioner is therefore not liable for Respondent's injury which she received on the line of Atlantic. The cited case does not support that contention because of the material difference in the facts of that case and of the instant case. In the **Chatters** case no employee of the initial carrier was on duty on the train while it was traveling on the line of the connecting carrier where the accident occurred. In an effort to overcome this material difference, the Petitioner erroneously states that the "undisputed evidence" shows that Grants and West were under the complete control of Atlantic's conductor at the time of the accident and were "loaned employees" (Pet. Cert., pp. 17, 18). That statement simply is not supported by the record. Coach attendant West in his deposition testified as follows concerning the source of his duties while in charge of coach cars all the way to Jacksonville:

"Q. Now, are those the duties that you are to do, are they the duties the Pennsylvania Railroad Company, your employer, has you do?

"A. Yes, sir.

"Q. And does anyone else tell you what to do on that train, that changes your duties any?

"A. I take orders from the conductor. If he asks me to do something, I have to take orders from the conductor. That's all.

"Q. But otherwise you do the things that your employer has trained you to do?

"A. Yes, sir.

"Q. And told you to do?

"A. Yes, sir" (A., p. 61).

The names of West and Grants as coach attendants are included in the list of Petitioner's employees in answer to Interrogatory 10 (A., pp. 120-122) who, as shown by the answers to Interrogatories 11 and 12 (A., pp. 122-123), did "participate in the operation of said 'South Wind' train from Louisville, Kentucky, to Jacksonville, Florida" and "were paid for their services entirely by the Petitioner." There is no evidence whatever in the Record to show that these employees were loaned to Atlantic or that Atlantic's conductor ordered or asked them to do anything.

In the **Chatters** case a passenger was injured on the line of a connecting carrier (Southern Railway Company) by pieces of flying glass from a window which was shattered when an outside window screen of the car in which he was riding came loose and slammed against and shattered the window. Both the connecting carrier (Southern Railway Company) and the initial carrier (the Louisville and Nashville Railroad Company) were sued by the passenger. The Court held that a verdict should have been directed in favor of the initial carrier (L. & N.) for the stated reason that "the complaint contained no allegation that Re-

spondent's injury was due to the negligence of the Louisville & Nashville. He contented himself with alleging and proving at the trial the accident and injury while he was traveling over the line of the Southern on a through ticket purchased from the Louisville & Nashville." The Court further said, "We think also there was no evidence for the jury of negligence of the Louisville & Nashville . . ." The train was a through train from New Orleans to Washington, D. C., and was operated under an agreement among three carriers which the Court said "was not offered in evidence." The Court pointed out that "the cars composing the train were furnished by the three carriers on the basis of their respective mileage; that each furnished locomotive power and train crews over its own line; and that each, while in possession of the **train, was in exclusive control** of it." (Emphasis supplied.)

The **Chatters** case is not in point on any contested issue in the instant case, because the material pleadings and facts in these two cases are so materially different that they are completely distinguished. There was no allegation and no evidence of negligence of the initial carrier in the **Chatters** case, as there is in the instant case. There, there was no allegation or evidence that an agency or a partnership existed between the carriers, whereas here there is such an allegation and such evidence. There, a complete change of train crews occurred when the train left the initial carrier's line and none of its employees continued on duty on the train while on the connecting carrier's line, whereas here a total of seventeen of Petitioner's employees continued on duty on the train all the way to Jacksonville over lines of connecting carriers. There are other distinguishing facts, but the foregoing suffice to make the **Chatters** case completely inapplicable, as the Court of Appeals found in its opinion (App. to Pet. Cert. 28).

QUESTION 4.

The State in Which the Injury Occurred

At page 19 of the Petition, Petitioner contends that Instruction No. 18 was erroneous because it permitted the jury to speculate as to whether the accident occurred in Alabama or in Georgia. That contention is without merit. It is stipulated as a fact in Paragraph 8 of the Stipulation of Facts (A., p. 139) that the accident in question happened while the train was traveling southward on a track of the Atlantic at a point either in Alabama or Georgia near the boundary line between those states. It occurred in the darkness of nighttime and apparently no one observed whether the train then was on one or the other side of the line.

The determination of whether the accident happened on the Alabama side or on the Georgia side of the boundary line would be important only if the laws of those states were materially different as to the degree of care required of common carriers for protection of their passengers against injury. But there is no material difference in those laws, since the degree of care required in each of these states is substantially the same. In Alabama it is the "highest degree of care" and in Georgia it is "extraordinary diligence."

However, if it had been necessary for the jury to determine on which side of the boundary line the accident occurred, there is sufficient evidence from which it could make that determination. In Exhibit 1 to the deposition of Pearl Hansen (A., p. 109), it is said that injury to Respondent occurred "at or near Cragford, Alabama, at about 4:00 a. m., on December 23, 1957." That would be a sufficient basis on which the jury could determine that

the accident happened in Alabama. In Paragraph 8 of the Stipulation of Facts (A., p. 139) it is stipulated that "the train was stopped at Manchester (Georgia) to permit a physician to enter the car and treat her for injuries . . .," from which the jury could reasonably infer that the accident happened in Georgia.

In view of the foregoing evidence, there was no error in giving Instruction No. 18, as the Court of Appeals held in its opinion (App. to Pet. Cert. 28-29).

QUESTION 5.

Applicability of Res Ipsa Loquitur.

In addition to direct evidence of negligence of Petitioner's coach employees and of Atlantic, acting as agent or partner of the Petitioner, there was a permissible inference by the jury of negligence attributable to the Petitioner under the rule of *res ipsa loquitur*. This rule applies because the evidence shows that the South Wind train and the coach car in which Respondent was injured were in the exclusive joint control of the Petitioner and of Atlantic acting as Petitioner's agent or partner, and because of the circumstances surrounding the accident. The fact that passengers may have taken pieces of baggage from the rack and returned the same thereto at some time or other does not militate against the fact of exclusive control of the train and coach car by the Petitioner, its agent, or its partner. It was the movement of the train in that exclusive joint control on a rough freight track that caused the baggage to "bounce" from the rack and to injure the Respondent. There is evidence that no person had been near the rack within an hour before the accident happened (A., p. 114, D of Hansen), and that the baggage on the rack was "O. K." about a half hour previously, when

Petitioner's coach attendant Grants last observed it (A., pp. 102, 103, D of Grants). Hence, there is evidence upon which the jury could properly rule out the possibility that the piece of baggage bounced off the rack and injured Respondent due to handling by a passenger.

It was not error for the Court to give an instruction on *res ipsa loquitur* in these circumstances. Such an instruction is "a rule which permits or requires an inference of negligence to be drawn from the fact of an accident plus the circumstances which characterize the accident. It is an evidential inference, which will carry a case to the jury, but is not binding upon the jury . . ." **Eker v. Pettibone** (C. A. 7), 110 F. (2d) 451, 455 (1940). In its opinion, the Circuit Court of Appeals stated: "We have examined the record and find there was sufficient factual evidence of Petitioner's control of the coach car and the train itself to make appropriate the instruction Petitioner objects to" (App. to Pet. Cert. 29).

QUESTION 6.

Denial of Petitioner's Motion for Directed Verdict.

In support of its contention that the District Court erred in overruling its motion for a directed verdict, Petitioner argues that there is no evidence of negligence on the part of the coach attendants or train crew, and that in any event it is not responsible for their acts or omissions (Pet. Cert. 15-18).

Evidence with record references has been heretofore set out showing that the coach attendants were on duty and participated in the operation of the train all the way from Chicago to Jacksonville; that they were employed and

paid entirely for their services by the Petitioner; that they wore uniforms and caps bearing Petitioner's insignia; that they did the duties Petitioner gave, trained, and told them to do; and that their duties included placing baggage on overhead racks in the coach cars, checking the same to see that it was properly placed, so that it would not fall down or constitute a hazard to passengers; that it could have been as much as a half-hour since the on-duty attendant had been in Respondent's coach before the accident, when the train was traveling on a rough freight detour track which made the train and the baggage shake.

This evidence was sufficient from which the jury could find that the coach attendants were Petitioner's employees at the time of the accident and that they were guilty of causal negligence in failing to check the overhead baggage with sufficient frequency or to secure it sufficiently under those circumstances.

There is evidence as heretofore shown from which the jury could find that Atlantic acted as agent or partner of the Petitioner and that it negligently operated the train over its rough detour track so as to cause the baggage to fall from the overhead rack onto and injure Respondent during sleeping hours in the nighttime. As already pointed out, the track on which the train was traveling was a rough freight track on which the train was rerouted from Birmingham to Waycross and the train was operated, so that it rocked and shook, shaking the baggage on the racks and causing it to "bounce" therefrom. The train at that time was in general charge of a conductor in the employ of the Atlantic, and he permitted this baggage to remain loose on the rack during sleeping hours so it could be shaken from the rack by the movement of the train on the rough track and fall onto and injure Respondent. The train was running about two

hours late at the time. In view of the high degree of care required of common carriers by both the law of Alabama and Georgia, the jury could properly find causal negligence on the part of Atlantic acting either as agent or partner of Petitioner in the operation of the train.

The Court of Appeals properly affirmed the denial of the motion for a directed verdict and stated: "An examination of the record in this case **clearly reveals** that the issue of Petitioner's negligence was properly submitted to the jury" (App. to Pet. Cert. 26) (Emphasis supplied.)

CONCLUSION.

Respondent respectfully submits that this is not a case where any special or important reason exists for the review by this Court of the judgment below. It is not claimed that the decision of the Court of Appeals is in conflict with the decision of another court of appeals on the same matter; no important state or territorial question is involved; no constitutional provisions, treaties, statutes, ordinances, or regulations are involved; and no court has departed from the accepted and usual course of judicial proceedings.

This is simply a common-law negligence action to recover damages from a common carrier railroad that could and did, as a principal, undertake to transport Respondent from Indianapolis, Indiana, to Jacksonville, Florida, in a reserved seat in a particular coach car, with other connecting railroads acting as its agents for that purpose, in a through train operated by Petitioner and other railroads in a partnership relationship whereby Petitioner was responsible not only for the negligence of itself and its own employees, but also the negligence of its agents, regardless of any disclaimer of liability in its tariff or

tickets. The evidence amply supports the general verdict and the judgment below.

Therefore, Respondent respectfully submits that the Petition for Writ of Certiorari should be denied.

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